Sheriff of Fulton County, Georgia, which are in Record, show the petition was filed on September 16, 1968, copy thereof and summons served the same date; and copy of the official reporter's transcript of the proceedings at that hearing that is in the Record show the hearing was held four days later. A copy of the said judgment of the Superior Court that is in the Record and another copy of it on pages ix and x of the Appendix attached beneath the petition to this Court read in part:

> ****the defendant having made a Motion to Dismiss the complaint for failure to state a claim upon which relief could be granted and a Motion for Summary Judgment; and after the citation of authority, hearing of evidence, and consideration by the Court, it is hereby ordered and adjudged that defendant's motions are granted, and the plaintiff's complaint is hereby dismissed with prejudice and judgment is granted to defendant, costs being cast upon the plaintiff."

A copy of "Co-Defendant's Motion to Dismiss" is on page ix of the Appendix and another copy in the Record. The Record discloses this was the only motion filed by the defendant and no separate motion for summary judgment was filed by him or any defendant. The copy of the original petition or complaint in the Record shows William Graham, Jr., Supervisor of Elections for Fulton County, Georgia, was named a defendant also; but copy of the amended and substituted complaint in the said Appendix, a copy also

being in the Record, shows the name of Mr. Graham, Supervisor of Elections, as a defendant, had been stricken, and he was no longer named a defendant. An entry made at the end of the amended and substituted petition and signed by Judge Morgan, before whom the hearing was held, shows the amended and substituted petition was allowed by him on September 19, 1968, and filed that date. An additional ground stated in paragraph 2 of said Motion to Dismiss was that plaintiff had failed to join an indispensable party. The copy of the reporter's transcript in the Record shows the "indispensable party" to which reference was made in paragraph 2 of the motion was the Secretary of State of Georgia. However, as indicated near the end of the copy of portions of that transcript in said Appendix, the defendant Weltner, near the end of the hearing, waived the ground stated in paragraph 2 of his motion.

The copy of portions of that transcript in said Appendix further indicates that paragraph 1 of the Defendant's Motion to Dismiss, reading "Plaintiff has failed to state a claim upon which relief can be granted", in addition to being considered as a motion to dismiss, was considered and treated as a motion for summary judgment, but that the only evidence before the Court during the hearing was the testimony of four witnesses adduced at the hearing and a Voting Summary, which was stipulated as evidence, near beginning of the hearing, by counsel for defendant Weltner. An examination of the copy of the Record that is before the Court will reveal that no affidavit, no deposition, no answers to interrogatories, and no admissions, in support of the motion to

to dismiss were ever filed for the defendant or any in defense against the motion ever filed for the plaintiff.

In the amended and substituted petition, the plaintiff contested, pursuant to the provisions of Chapter 34-17 of the Georgia Election Code, that Code being Title 34 of the Code of Georgia, the result of the Democratic Primary held on September 11, 1968, in the Fifth Congressional District of Georgia for nomination for Representative for that District in the United States House of Representatives. Weltner and Lowe had been the only candidates for such nomination in that Primary. Weltner was declared the nominee.

The opinion delivered for the Court of Appeals of Georgia on the appeal is officially reported 118 Ga. App. 635 and 164 S. E. 2d 919. Appellant Lowe filed a timely motion for rehearing in that Court of Appeals. After denial of that motion, he filed in the Supreme Court of Georgia a petition for writ of certiorari for review of the judgment of the Court of Appeals. That petition was denied.

The failure by the lower Court, namely, the Superior Court of Fulton County, Georgia, to grant any of the repeated requests made by the plaintiff, as attorney pro se, for a short recess during the September 20, 1968 hearing on defendant Weltner's motion to dismiss to permit him to amend his pleading, after the Court had stated it thought it had a duty to allow plaintiff to amend and when such amending would have removed any cause for dismissal, and the treatment by the lower Court of the motion to dismiss as

such motion and also as a motion for summary judgment when the only evidence before the Court was testimony of four witnesses adduced at the hearing and the said VOTING SUMMARY and when plaintiff had never agreed for the hearing to proceed on the motion as one for summary judgment, the motion not having been served upon plaintiff until about ten minutes after time for the hearing to begin, together with other acts of the lower Court, were a departure by that Court from the accepted and usual course of judicial proceedings and in violation of the "due process" clause of the Fourteenth Amendment of the United States Constitution. The extent to which the Court of Appeals of Georgia, in effect, sanctioned such departure of the lower Court calls for an exercise of this Court's power of supervision.

Moreover, considering what the official reporter's transcript shows to have transpired during said hearing, the judgment of the lower Court, the apparent failure of the Court of Appeals, as shown in its opinion, to consider the question of whether the lower Court abused its discretion in not allowing plaintiff to amend after plaintiff had raised that question, among others, in his Enumeration of Errors, and considering failure of the Court of Appeals to correct other errors, it is evident that Court of Appeals, in effect, decided important state questions in ways in conflict with applicable Georgia law and the "due process" clause of the Fourteenth Amendment.

The said motion of Mr. Weltner, entitled "Co-Defendant's Motion to Dismiss", that is in the Record, indicates in the introductory paragraph it is brought under the provisions of Section 81A-112 (b) (6) and (7) of Title 81A of the Georgia Code. The first part of the title of that section is "Defenses and Objections". The said No. (7) referred to, a defense that may be made in a motion, is "failure to join anindispensable party". The said transcript of the September 20, 1968 proceedings on the motion to dismiss, most of that transcript being on pages x-xxiv of said Appendix, shows that the defendant, near the end of the proceedings, waived the Number 2 ground of his motion, which was "failure to join an indispensable party".

The only other ground stated in the motion to dismiss is in paragraph 1 thereof and is failure to state a claim upon which relief can be granted. That is the (6) in said Section 81A-112 (b) (6). The part of Section 81A-112 (b) that applied to paragraph 1 of the motion to dismiss reads:

> "Every defense, in law or fact, to a claim for relief in a pleading, whether a claim, counterclaim, cross-claim, or third party claim, shall be asserted in the responsive pleading, except that the following defenses may at the option of the pleader be made by motion in writing: * * * (6) failure to state a claim upon which relief can be granted * * * * * * * * * * If, on a motion asserting the defense

> "numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in section 81A-156, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by section 81A-156."

Said quoted part of Section 81A-112 (b) of Title 81A of the Georgia Code is identical with the corresponding part of Rule 12 (b) of the Federal Rules of Civil Procedure. The new Civil Practice Act of Georgia, which became effective in August 1967, made numerous changes as to pleadings in Georgia Courts. It was modeled upon the Federal Rules of Civil Procedure, although there were some deviations in it from those Rules. The new Title 81A of the Georgia Code is a codification of that Act. The sections in Title 81A are numbered in a manner similar to the corresponding sections in the Federal Rules. Thus Section 81A-112 of the Georgia Code corresponds to Rule 12 of the Federal Rules.

With reference to "the defense numbered (6)" contained in the foregoing quotation from said Section 81A-112 (b), matters outside of the pleading that were presented to and not excluded by the Superior Court at the hearing stated were the testimony of four witnesses adduced at the hearing and the VOTING SUMMARY,

stipulated in evidence by counsel for defendant Weltner near the beginning of the hearing. However, Section 81A-156 of the Georgia Code, corresponding to Rule 56 of the Federal Rules, each entitled "Summary Judgment", in connection with determination of a motion for summary judgment, does not authorize use of testimony of witnesses adduced at the hearing of the motion.

Said quoted "(6)" of Section 81A-112 (b) requires that when a motion to dismiss may be treated as a motion for summary judgment it must be "disposed of as provided in section 81A-156, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by section 81A-156". Certainly the said motion was not disposed of in the manner required in Section 81A-156, "Summary Judgment". Efforts of plaintiff to obtain permission to amend in such manner as to identify additional polling places in precincts where Negro registered voters predominated and then have numerous witnesses of his present in the courtroom to testify in support of his allegations, in the last subparagraph of paragraph 6 of his pleading, of "Malconduct, fraud, and/or irregularities by poll officers * * * * at almost every other polling place in the 5th District where the electors were mainly of the Black Race", besides the 11 polling places he had identified, "sufficient to change the result of the Primary as to that office or place it in doubt", were of no avail.

In this connection, the following part of the testimony of Dr. Tibbs, a

colored pharmacist, one of plaintiff's witnesses, is quoted from that part of the reporter's transcript on page xvi of said Appendix:

> "Q. Do you have any general knowledge of any mal-conduct or fraud?
>
> BY THE COURT: This is not in issue before the Court at this time. This is a Motion to Distmiss."

When Dr. Tibbs was thus not allowed to testify about malconduct or fraud, plaintiff was precluded from having testimony of any of his many witnesses present in the courtroom having knowledge of such at about every other polling place in precincts in the 5th District where the registered voters were mainly Negroes. Plaintiff was thereby not "given reasonable opportunity to present all material made pertinent to such a motion by section 81A-156".

The following applicable part of said Section 81A-156, "Summary Judgment":

> "(c) Motion and proceedings thereon.— The motion shall be at least 30 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on

> "file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law; but nothing in this section shall be construed as denying to any party the right to trial by jury where there are substantial issues of fact to be determined ***."

The foregoing quoted sentence of Section 81A-156 (c) is identical with the corresponding part of Rule 56 (c) of the Federal Rules, except that said part of the Federal Rule requires the motion to be served only at least ten days in advance, instead of 30 days in advance, of the time fixed for the hearing.

The judgment, having title "Order", rendered following said hearing does not contain any statement that no genuine issue of material fact had been shown.

In conjunction with petitioner's contentions herein regarding consideration of the motion as one for summary judgment, the following citations are given:

> If upon the proofs, adduced in support of motion for summary judgment, any doubt remains as to existence of genuine issue of material fact, such motion must be resolved against movant and motion denied.
>
> Carter v. Williams, 361 F.2d 189

On motion for summary judgment burden is upon moving party to establish the lack of triable issue of fact and the right to judgment as a matter of law.

Revlon, Inc. v. Regal Pharmacy, Inc., 29 F. R. D. 169

The summary judgment procedure is generally considered a drastic remedy and strict compliance with the provisions of the rule is required.

Parmelee v. Chicago Eye Shield Co., 157 F.2d 582, 168 A. L. R. 1130.

The transcript (Appendix, pages x-xxiv) discloses that the lower Court gave no notice at the beginning of or during the hearing that the motion to dismiss would be considered also as a motion for summary judgment.

Evidence in the VOTING SUMMARY, that was stipulated by defendant's attorney near beginning of the hearing, showed that more than 25,000 votes were cast for said two candidates in the polling places in precincts where Negro registered voters (electors) were in the majority. That number of votes far exceeded the number required to change or cast doubt on the result, but the failure of the Court to allow plaintiff's large number of witnesses in the courtroom to testify about very serious wrong doing and flagrant violations of elections laws as to which they were ready to testify precluded hearing before the Court testimony of even one witness for plaintiff as to such in any polling place.

The Record discloses that the Democratic Primary out of which the contest arose was held on September 11, 1968; that the contest petition was filed on September 16, 1968, the date of official declaration of the results of the Primary; and that the judgment of the Superior Court in the case was rendered on September 20, 1968. It is apparent that, under such conditions as to time, it was virtually impossible for depositions of witnesses to be taken and filed before the September 20th hearing on the motion to dismiss as such motion and also as a motion for summary judgment.

It is requested the Court take judicial notice of the following:

That, in the November 5, 1968 General Election in the Fifth Congressional District of Georgia, the names, Charles L. Weltner, as the Democratic nominee, and Fletcher Thompson, as the Republican nominee, the only candidates for said office, appeared on the official ballot; that Fletcher Thompson was officially declared the winner; that Wyman C. Lowe, within five days after date of official determination and declaration of the result, filed a petition in the Superior Court of Fulton County, Georgia, brought under the provisions of said same Chapter 34-17 of the Georgia Election Code, naming Fletcher Thompson defendant and contesting the result of the November 5th Election on the ground, among other grounds, that Charles L. Weltner, as a candidate in the General Election had not been the lawful Democratic nominee, that such fact made the result of the General Election as to that office invalid, and the General Election as to that office should be declared null and void; that Wyman C. Lowe, in the contest of the result of the November 5th General

Election, took numerous depositions of witnesses, after proper notice to the defendant of the taking, in support of his allegations in his petition that wrong doing and violations of election laws in the September 11, 1968 Democratic Primary as to said office in each of 40 Fifth District polling places in precincts where the registered voters were predominantly black persons were such as to change or place in doubt the result as to that office; and that there has not been an adjudication in that case.

Reference is made to the copy of the "VOTING SUMMARY-FULTON COUNTY-OFFICE OF U. S. REP IN CONGRESS FROM 5th CONG DIST OF GA.-PRIMARY ELECTION SEPTEMBER 11, 1968" which is on the last three pages of the Appendix attached beneath the petition for certiorari. There is a circle around identifying letter-number of each of the forty precincts in the 5th Congressional District as to which the two columns of figures on right side of each of the pages having headings "WHITE REG VOTERS" and "NEGRO REG VOTERS" show there were on September 11, 1968 more Negro registered voters than white voters. Two columns of figures on left side of each of the three pages have the headings "LOWE VOTES" and "WELTNER VOTES", respectively. Addition of the "LOWE VOTES" in the said forty precincts, as to each of which there are identifying letter-numbers in the left column, gives a total of 1,360 votes. Addition correspondingly of the "WELTNER VOTES" in those same forty precincts gives a total of 23,834. A counting of the precincts shown on the VOTING SUMMARY gives a total of 155. Thus it is shown there are 115 precincts in each of which white registered voters predominate.

The total of votes for Weltner in those 115 precincts is shown, in effect, by the VOTING SUMMARY to have been less than the total for Lowe in those 115 precincts. It is clear that the lead in votes of Weltner over Lowe in that race was in the precincts where Negro registered voters predominated. The total numbers of votes for Weltner and for Lowe are shown at bottom of the last page of the VOTING SUMMARY to be 49,973 and 27,883, respectively. Weltner is shown to have been credited with 22,091 more votes than Lowe. The VOTING SUMMARY shows that his lead over Lowe in the forty said precincts where Negro registered voters predominated was 22,474, a greater lead in those forty precincts than his lead 5th District-wide.

A copy of the entire official reporter's transcript of the proceedings at the hearing held on September 20, 1968 is in the Record, that is before the Court. A copy of most of that transcrip is on pages x-xxiv, inclusive, of said Appendix. There is included on pages xi, xii and xiii of the Appendix all of the testimony at the hearing of Mr. Graham, Supervisor of Elections for Fulton County, as to the votes for Weltner and for Lowe in precincts specifically identified by location in the amended and substituted petition as ones in which the voters were mainly black persons. The total votes for Weltner and Lowe in only eleven of said forty precincts were thus stated in the testimony of Mr. Graham, as shown on page xii of that Appendix, to be 4,941 and 473, respectively. In his testimony as to the total votes for Lowe and Weltner, as shown on page xiii of the Appendix, he gave the

same totals indicated at bottom of last page of the VOTING SUMMARY at end of that Appendix.

A part of Mr. Graham's testimony that is in the copy of entire transcript in the Record, but inadvertently omitted from the portions in said Appendix, shows he further testified that the total of 5,414 votes, obtained by adding the 473 votes for Lowe and 4,971 for Weltner cast in said eleven precincts, was not sufficient to change or cast in doubt the result of the Primary as to that office. However, a study of the VOTING SUMMARY indicates the totals of votes cast for the two candidates, in said 40 precincts, there being only one polling place in each precinct in the Fifth District, were 23,834 for Weltner and 1,360 for Lowe, a grand total of 25,194 for the two candidates together. The total of votes cast for the two candidates in those 40 precincts in that Primary was about five times as many as in the only 11 precincts considered at said hearing. The total of votes for Weltner in those 40 precincts may be obtained from the VOTING SUMMARY by adding together votes shown thereon to have been cast for him in each of the 40 precincts as to which the identifying numbers-letters circled in the left column, and the total of votes for Lowe may be obtained in like manner. Subtraction of the total number of votes for Lowe in the 40 precincts from the total number of votes for Weltner in those 40 precincts indicates that Weltner had a lead of 22,474 votes over Lowe in those 40 precincts. Subtraction of the total number of votes for Lowe in the Fifth District, those totals being at bottom of last

page of the VOTING SUMMARY, gives a lead of 22,091 votes for Weltner. A comparison of the Weltner lead in said 40 precincts, in which the VOTING SUMMARY shows Negro registered voters predominated, with the Weltner lead Fifth District-wide in all of the 155 precincts in the Fifth District, including said 40 precincts, reveals his lead in those 40 precincts was 383 votes more than than it was Fifth District-wide. A decrease of 11,100 votes for Weltner and an increase of 11,100 votes for Lowe in those 40 precincts in which Weltner was credited with 23,834 votes and Lowe credited with only 1,360 votes would have resulted in Lowe winning the nomination.

It is stated in the opinion delivered for the Court of Appeals of Georgia on the appeal that the Court took judicial notice of total number of precincts and the returns, these being in said VOTING SUMMARY. In support of that statement the following were cited:

> "31 C. J. (Evidence), Sec. 51, page 1045; Morris v. Fortson, 262 Fed. Supp. 93 (3); Hanover v. Boyd, 173 Tenn. 426; 121 SW 2d 120 (1)."

It is requested that this Court take judicial cognizance of the number of precincts and returns, as contained in the VOTING SUMMARY at end of said Appendix, and also the returns in the September, 1966 Democratic Primary in the same Fifth Congressional District with respect to the same office. The same Mr. Weltner, Kelly Brown, a lawyer, and the same Lowe were the candidates for nomination for the office in that Primary. The returns show that Lowe received more than twice

as many votes as Weltner and Brown together in the precincts where white registered voters predominated. Those returns also show that Lowe received approximately 12 per cent of the votes cast for the three candidates in the precincts where most of the registered voters were black. However, a comparison of the returns as to the said office in those two Democratic Primaries would show that Lowe received in the 1968 Primary only about two-thirds as many votes in the precincts in which black registered voters predominated as he did in such precincts in the 1966 Primary. As it was evident to registered voters in that Fifth District that Lowe, in his campaign prior to September, 1966 Primary, concentrated his main efforts, including his advertising, mainly in the areas where the majority of registered voters were white, and that he, in his campaign prior to the 1968 Primary, expended most of his efforts, including his advertising, in the areas where the most of the registered voters were black, the Court may be willing to take judicial cognizance of such difference in the conduct of the two campaigns. If the Court takes judicial notice of the fact, evident generally to registered voters of said Fifth District, that Lowe conducted a very much stronger and more expensive campaign in 1968 in the predominantly black areas prior to the September, 1968 Primary than he did in those areas prior to the September, 1966 Primary, but was credited with receiving only about two-thirds as many votes in the precincts in those areas in the 1968 Primary as he was in such precincts in the September, 1966 Primary, his allegations in his pleading

as to conditions that prevailed at the polling places in those precincts in the 1968 Primary will have greater significance. In a Democratic Primary held prior to 1966 in the Fifth District of Georgia, in which a candidate, who was not Mr. Weltner, and Lowe were the only candidates for the said office, Lowe received about 85 per cent of votes cast in precincts where registered voters were mainly Negroes.

The part of the amended and substituted petition which plaintiff sought mainly by his repeated requests to permit him to amend is the last subparagraph of paragraph 6. That subpara- reads in part as follows:

> "Such malconduct, fraud and/or irregularities by poll officers at the polling places hereinbefore stated, where the electors were mainly black persons, and at almost every other polling place in the 5th District where the electors were mainly of the Black Race * * * were sufficient to change the result of the primary as to that office or place it in doubt * * * * *"

The first request that plaintiff made during said hearing, as shown in that part of the transcript on page xiv of said Appendix, was as follows:

> "BY MR. LOWE: I am going to state now, Your Honor, I am going to request permission to amend to set out more precincts with particularity."

Plaintiff thus indicated he wished to amend by setting out additional precincts to which he had referred in said quoted subparagraph by the statement "and at almost every other polling place in the 5th District where the electors were mainly of the Black Race".

Plaintiff in his allegations gave notice to the defendant that wrong doing and violations of election laws sufficient to change or cast in doubt the result of the Primary as to that office had occurred at polling places where the electors were mainly black persons and thereby, in effect, delimited the number of polling places to 40 of the 155 in the Fifth District, there being only one polling place in each precinct in the District. It seems that the proper remedy for the defendant to have used to call for more particularity as to identity of those polling places was a motion for a more definite statement, corresponding to a special demurrer under former Georgia law on pleading and practice, if greater particularity was required by applicable law, instead of a motion to dismiss, in nature of general demurrer, which was used in Georgia until the new Civil Practice Act became effective in 1967. The Court asked counsel for Mr. Weltner during the hearing the following question:

> "BY THE COURT: Well, go back to where it is subject to general demurrer or special demurrer, isn't that ground for special demurrer to make it more particular. We are speaking of his right to amend as set forth in the particuler paragraph."

In this connection, Section 81A-112 (e) of the Georgia Code, in effect at time of the hearing, is quoted:

> "(e) Motion for more definite statement. If the pleading to which a responsive pleading is is permitted is so vague or ambiguous that a party cannot reasonably be required to frame a proper responsive pleading, he shall nevertheless respond to the best of his ability, and he may move for a more definite statement. The motion shall point out the defects complained of, and the details desired. If the motion is granted and the order of the court is not obeyed within 15 days after notice of the order or within such other time as the court may fix, the court may strike the pleading to which the motion was directed or make such other order as it deems just".

The Court of Appeals did not apply this paragraph (e) of Section 81A-112 in its ruling. That paragraph (e) is identical with the corresponding paragraph (e) of Federal Rule 12.

With respect to said quoted paragraph (e) and the last subparagraph of paragraph 6 of the amended and substituted petition, the following decisions are cited:

> If a complaint is too vague to enable the defendant to prepare his answer or prepare for trial,

he should not move to dismiss but should move for a more definite statement or bill of particulars.

Berger v. McHugh, 26 Fed. Supp. 107

Pleadings under the rules are designed for the purpose of merely giving notice and the details of claims and defenses are to be elicited by discovery, admissions and pre-trial procedures.

McDonald v. Astor, 21 F. R. D.159

Subdivision (e) of this rule may only be invoked when the pleading is so vague or uncertain that the defendant cannot adequately prepare responsive pleadings; the short, direct and responsive pleading required by rule 8 (a) should be encouraged; and rule 8 (a) should not be nullified by too liberal construction of subdivision (e) of this rule.

Walling v. Black Diamond Coal Mining Co., 59 Fed. Supp. 348

No reference is made in any way in the opinion delivered for the Court of Appeals to the contents of Number 1 and 4 of appellant's Enumeration of Errors, which relate to issues raised in the hearing in the lower Court as to whether or not there was requirement under applicable law for plaintiff to identify in his pleading each of the additional polling places to which he referred in the last subparagraph

of paragraph 6 of his pleading as "almost every other polling place in the 5th District where the electors were mainly of the Black Race" and, if there was such requirement, whether or not his request for a short recess to permit him time to amend his pleading should have been granted. A copy of the Enumeration of Errors he filed timely in that Court of Appeals is on pages xxv and xxvi of said Appendix.

In this connection, the following decisions are cited:

> Error in disallowing a proffered amendment germane to cause of action set forth in original petition rendered nugatory all subsequent steps in trial of cause.
>
> Woodward v. Fuller, 98 S. E. 323, 148 Ga. 239
>
> Amendment elaborating facts already alleged in petition allowable.
>
> Stan-Rich Co. v. Schneider, 123 S. E. 2d 166, 105 Ga. App. 748
>
> Defect of failure to attach bill of particulars where required must be taken advantage of by special demurrer.
>
> Brown v. McClelland, 155 S. E. 2d 660, 115 Ga. App. 617
>
> Generally, a pleading may be amended at any time before final order

sustaining general demurrer, or motion to dismiss in nature of general demurrer,

215 Ga. 507, 87 S. E. 2d 52

On motion to dismiss amendable defect was disregarded.

Simmons v. Eagle Seelatsee, 244 F. Supp. 898, affirmed 384 U.S. 209

The allegations in the amended and substituted petition were not delimited to wrong doing by only poll officers in polling places where registered voters were mainly black persons. The allegations in some of the subparagraphs show, in effect, there were violations of election lawsby campaign workers for Mr. Weltner in their distribution of campaign cards, each having at its top the title "OFFICIAL VOTER GUIDE", inside polling places or within 50 feet thereof. Such distribution was in violation of that part of Section 34-1703 (a) of the Georgia Election Code reading:

"(a) No persons, with the exception of candidates, shall solicit votes in any manner or by any means or method, nor shall any person distribute any campaign literature, newspaper, booklet, pamphlet, card, sign, or any other written or printed matter of any kind in support of any person, party, body, or proposition on any primary of election day within two hundred fifty feet (250') of any polling

"place or of the outer edge of any building within which such polling place is established, whichever distance is the greater."

It was not ncessary to plead applicable state law.

Paragraph 9 of the amended and substituted petition, which alleges wrong doing, but does not allege wrong doing by poll officers, reads:

"9. In the polling place at Washington High School Building and in other polling places on display where the electors were mainly black person, the sample ballot on display to electors contained the name of Mr. Weltner as a candidate for Congress, but not the name of Mr. Lowe as such candidate."

Paragraph 10 of the amended and substituted petition is quoted next:

"10. A section of said Code provides that the state executive committee of any political party may adopt and promulgate rules governing any primary of that party. Such Rules of the State Democratic Executive Committee of Georgia then effective provided that any candidate for an office in a Democratic Primary would be allowed representation among poll officers, including clerks and assistant managers, insofar as practicable. A list of fifteen names of persons qualified to be

"poll officers were submitted to a proper election party official by an agent for Mr. Lowe for use at the polls on said day, but the entire list was rejected or none on it used that day. Irregularities and fraud resulted in many polling places in the black areas for which such suggested poll officers were intended because of their not being assigned to such duty, many poll officers whose names suggested by or for Mr. Weltner having been assigned to such duty."

Thus, there were in the amended and substituted petition, in addition to allegations as to wrong doing by poll officers, allegations, in effect, as to wrong doing and violations of election laws by others, including the unlawful distribution of campaign cards by campaign workers for Mr. Weltner within the distance from a polling place prohibited by Section 34-1703 (a), the display in some of said kinds of polling places of sample ballots having thereon the name of Weltner as a candidate for said office, but omitting the name of Lowe as such candidate, the refusing by a party official to grant request of Lowe for representation at polling places by persons as poll officers whose names appeared on a list submitted by an agent for him to a proper election party official. The said transcript does not show that the lower Court took cognizance of or in any way considered such additional allegations in connection with its consideration of and granting of

the motion to dismiss as such motion and also as a motion for summary judgment and its not allowing any of plaintiff's many witnesses in the courtroom to testify as to wrong doing, including violations of election laws. The only reference made in any way in the opinion of the Court of Appeals to any of said additional allegations is in the last sentence of the first subparagraph of paragraph 2 of the opinion, wherein reference is made to an allegation in paragraph 9 of plaintiff's pleading as to display of an improper sample ballot at one polling place, although it was alleged in said paragraph 9 such display of improper ballot card was made also "in other polling places". However, plaintiff's statement in Number 2 of his Enumeration of Errors as to his witnesses not being allowed to testify related also to some of them not being allowed to testify with respect to said additional allegations.

Petitioner asserts as only part of his grounds for writ of certiorari for review of the judgment of the Court of Appeals the sanctioning by that Court of Appeals of the failure of the lower Court to grant plaintiff's request for recess to amend by identifying said additional polling places so that, because of allegations of wrongful acts of only poll officers, such amending would lead to or result in rejection of the votes in all or almost all the polling places in precincts where the registered voters were predominantly black persons. He asserts also as part of his grounds for such writ of certiorari the sanctioning, in effect, by that Court of Appeals of the addi-

tional acts and failures to act of the lower Court to which references have been made hereinbefore and which involved wrongful acts by persons other than poll officers, including the wrongful acts by other persons indicated on pages 19-22, inclusive hereof, that constituted departures from the usual course of judicial proceedings, but that probably would not lead to rejection of all the votes for the two candidates in all or almost all of the polling places in precincts where registered voters were mainly of the black race.

The fact the lower Court would not, in effect, allow Dr. Tibbs, plaintiff's witness, to answer plaintiff's question as to whether he had "any general knowledge of any mal-conduct or fraud", as is shown in copy of part of said transcript on page xvi of said Appendix, prevented plaintif from obtaining testimony from Dr. Tibbs and some of plaintiff's other witnesses then in the courtroom in support of his allegations in paragraph 7 of his amended and substituted petition. The allegations in that paragraph 7 were made in accordance with grounds of contest authorized in Section 34-1703 (c) of the Georgia Election Code. That paragraph 7 reads:

> "7. Illegal votes were received and legal votes rejected at the polls within the 5th District on that day for that office sufficient to change the result of the Primary or to leave it in doubt."

THEREFORE, it is submitted that the petition for certiorari should be granted.

Respectfully submitted,

CHARLES E. MUSKETT
Attorney for Petitioner

1084 E. Cleveland Avenue
East Point, Georgia 30344

AFFIDAVIT AS TO SERVICE

COUNTY OF FULTON, GEORGIA.

I hereby certify that I have, in compliance with Rule 33 of this Court, on this date, June 28, 1969, served a copy of the foregoing Supplemental Brief of the undersigned Petitioner for Certiorari upon counsel who were of record for said Respondent in Certiorari in this case in State Courts of Georgia by depositing a copy in an envelope, addressed to Alston, Miller and Gaines, Attorneys at Law, at their offices, Citizens and Southern National Bank Building, Atlanta, Georgia, 30303, with sufficient postage attached to this envelope to insure its delivery.

WYMAN C. LOWE

Duly sworn and subscribed to before me, this 28th day of June, 1969.

Elaine D. Underwood
NOTARY PUBLIC
Notary Public, Georgia State at Large
My Commission Expires April 16, 1973